



RULE-MAKING ORDER
(RCW 34.05.360)



Agency: Columbia River Gorge Commission

Permanent Rule
 Emergency Rule
 Expedited Rule Making

(1) Date of adoption: October 8, 2002

(2) Purpose: The amendments bring the rule into compliance with the more restrictive statutory provisions of the states of Washington or Oregon.

NOTE: THIS IS A CORRECTION TO WSR 02-21-072

(3) Citation of existing rules affected by this order:
 Repealed:
 Amended: 350-16
 Suspended:

(4) Statutory authority for adoption: RCW 43.97.015
 Other Authority: U.S.C. 544c; ORS 197.150

PERMANENT RULE ONLY (Including Expedited Rule Making)
 Adopted under notice filed as WSR **02-17-076** on August 19, 2002
 Describe any changes other than editing from proposed to adopted version: None

EMERGENCY RULE ONLY
 Under RCW 34.05.350 the agency for good cause finds:
 (a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
 (b) That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

 Reasons for this finding:

(5.3) Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?:
 Yes No If Yes, explain:

(6) Effective date of rule:

Permanent Rules
 31 days after filing
 Other (specify) 12-2-02

Emergency Rules
 Immediately
 Later (specify) _____

*(If less than 31 days after filing, specific finding in 5.3 under RCW 34.05.380(3) is required)

Name (Type or Print)
Robert K. McIntyre

Signature
Robert K. McIntyre

Title
Rules Coordinator

Date
10/23/02

CODE REVISER USE ONLY

10:05
02-22-007C

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	_____	Amended	_____	Repealed	_____
Federal rules or standards:	New	_____	Amended	_____	Repealed	_____
Recently enacted state statutes:	New	0	Amended	7	Repealed	_____

The number of sections adopted at the request of a nongovernmental entity:

New	_____	Amended	_____	Repealed	_____
-----	-------	---------	-------	----------	-------

The number of sections adopted in the agency's own initiative:

New	_____	Amended	7	Repealed	_____
-----	-------	---------	---	----------	-------

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	_____	Amended	7	Repealed	_____
-----	-------	---------	---	----------	-------

The number of sections adopted using:

Negotiated rule making:	New	_____	Amended	7	Repealed	_____
Pilot rule making:	New	_____	Amended	_____	Repealed	_____
Other alternative rule making:	New	_____	Amended	_____	Repealed	_____

AMENDATORY SECTION

350-16-003. Description of Organization; Rules Coordinator; Service of Order; Effect of Not Putting Order in Writing.

(1) In addition to other rulemaking requirements imposed by law, the commission shall publish a description of its organization and the methods whereby the public may obtain information or make submissions or requests.

(2) The commission shall appoint a rules coordinator and file a copy of that appointment annually with the Oregon Secretary of State and Washington Code Reviser. The rules coordinator shall:

- (a) Maintain copies of all rules adopted by the agency and be able to provide information to the public about the status of those rules;
- (b) Provide information to the public on all rulemaking proceedings of the agency; and
- (c) Keep and make available the mailing list required by 350-16-004(7).

(32) An order shall not be effective as to a person or party unless it is served upon him either personally or by mail. This subsection is not applicable in favor of any person or party who has actual knowledge of the order.

(43) An order is not final until it is reduced to writing.

AMENDATORY SECTION

350-16-004. Notice Requirements for Rule Adoption; Temporary Rule Adoption, or Amendment; Substantial Compliance Required.

(1) The commission shall prepare a semiannual agenda for rules under development. The commission shall file the agenda with the Oregon Secretary of State and Washington Code Reviser for publication in the states' registers not later than January 31st and July 31st of each year. Not later than three days after its publication in the states' registers, the commission shall send a copy of the agenda to each person who has requested receipt of a copy of the agenda.

(2) When applicable under Washington law, the commission shall prepare a statement of inquiry on the form provided by the Washington Code Reviser, that shall be filed with the Washington Code Reviser for publication in the state's register at least thirty days before the date the agency files notice of proposed rule making, sent to any

party that has requested receipt of the agency's statements of inquiry, and published on the Commission's website or other similar means of electronic communication.

(34) Prior to the adoption, amendment or repeal of any rule, the commission shall give notice of its intended action:

(a) In the manner established by rule adopted by the commission, which provides a reasonable opportunity for interested persons to be notified of the agency's proposed action;

(b) In the Oregon bulletin and Washington register at least 210 days prior to the commencement of any commission action; and

(c) At least 28 days before the effective date, to persons who have requested notice pursuant to subsection (9) of this section; and, ~~No later than three days after publication in the register and bulletin, to persons who have requested notice pursuant to subsection (7) of this section.~~

(d) On its website or other similar means of electronic communication.

(42)(a) The notice required by subsection (34) of this section shall state the subject matter and purpose of the intended action in sufficient detail to inform a person that the person's interests may be affected, and the time, place and manner in which interested persons may present their views on the intended action.

(b) The commission shall include with the notice of intended action given under subsection (34) of this section:

(A) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule;

(B) A statement of the need for the rule and a statement of how the rule is intended to meet the need;

(C) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the commission in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection. The list may be abbreviated if necessary, and if so abbreviated there shall be identified the location of a complete list;

(D) A statement of fiscal impact identifying state agencies, units of local government and the public which may be economically affected by the adoption, amendment or repeal of the rule and an

estimate of that economic impact on state agencies, units of local government and the public. In considering the economic effect of the proposed action on the public, the agency shall utilize available information to project any significant economic effect of that action on businesses which shall include a cost of compliance effect on small businesses affected.

- (E) A statement of the anticipated effects of the proposed rule;
- (F) A statement whether the rule is necessary as a result of federal law or a court decision;
- (G) An indication of the person or persons proposing the rule;
- (H) The date on which the commission intends to adopt the rule; and
- (I) The commission personnel responsible for implementation and enforcement of the rule, with office location and telephone number.
- (J) If an advisory committee is not appointed, or an opportunity for interested parties to participate in the rule-making process prior to publication of the proposed rule has not been provided, an explanation as to why no advisory committee or participation by interested persons was used to assist the agency in drafting the rule.

(53) When the commission proposes to adopt, amend or repeal a rule, it shall give interested persons reasonable opportunity to submit data or views at a public hearing. The commission shall consider fully any written or oral submissions, including all submissions received by facsimile, telephonic communication, or electronic mail.

(64) Upon request of an interested person received within 15 days after commission notice pursuant to subsection (24) of this section, the commission shall postpone the date of its intended action no less than 21 40 nor more than 90 days in order to allow the requesting person an opportunity to submit data, views or arguments concerning the proposed action. Nothing in this subsection shall preclude the commission from adopting a temporary rule pursuant to subsection (75) of this section.

(75) Notwithstanding subsections (1) to (64) of this section, the commission may adopt or amend a rule without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, if the commission prepares:

- (a) A statement of its findings that its failure to act promptly will result in serious prejudice to the public interest or the interests of the parties concerned and the specific reasons of its findings of prejudice;

- (b) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule;
- (c) A statement of the need for the rule and a statement of how the rule is intended to meet the need; and
- (d) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the commission in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspections.

(86) A rule adopted or amended under subsection (75) of this section is temporary and may be effective for a period of not longer than 120 90 days. The adoption of a rule under this subsection does not preclude the subsequent adoption of an identical rule under subsections (1) to (64) of this section.

(97) Any person may request in writing that the commission mail to the person copies of its notice of intended action given pursuant to subsection (34) of this section. Upon receipt of any request the commission shall acknowledge the request, establish a mailing list and maintain a record of all mailings made pursuant to the request. The commission may establish procedures for establishing and maintaining the mailing lists current and, by rule, establish fees necessary to defray the costs of mailings and maintenance of the lists.

(108) This section does not apply to public contracts and purchasing.

(119) No rule is valid unless adopted in substantial compliance with the provisions of this section in effect on the date the rule is adopted.

(1240) Unless otherwise provided by statute, the adoption, amendment or repeal of a rule by an agency need not be based upon or supported by an evidentiary record.

(13) The commission may correct its failure to substantially comply with the requirements of subsections (4) and (7) of this section in adoption of a rule by an amended filing, so long as the noncompliance did not substantially prejudice the interests of persons to be affected by the rule. However, this subsection does not authorize correction of a failure to comply with subsection (3)(b)(D) of this section requiring inclusion of a fiscal impact statement with the notice required by subsection (1) of this section.

(14) When the commission establishes a deadline for comment on a proposed rule under the provisions of subsection (4) of this section, the commission may not extend that deadline for another agency or person unless the extension applies equally to all interested agencies and persons. An agency shall not consider any submission made by another agency after the final deadline has passed.

AMENDATORY SECTION

350-16-006. Filing and Taking Effect of Rules; ~~Filing of Executive Orders~~; Copies.

- (1)(a) The commission shall file in the office of the Oregon Secretary of State and Washington Code Reviser a certified copy of each rule adopted by it.
- (b) Notwithstanding the provisions of paragraph (a) of this subsection, the commission adopting a rule incorporating published standards of reference is not required to file a copy of those standards with the Oregon Secretary of State or the Washington Code Reviser if:
 - (A) The standards adopted are unusually voluminous and costly to reproduce; and
 - (B) The rule identifies the location of the standards to be incorporated and the conditions of their availability to the public.
- (2) Each rule is effective upon the expiration of 30 days after the date of filing as required by subsection (1) of this section, except that:
 - (a) If a later effective date is required by constitution, statute or court order, the later date is the effective date.
 - (b) If a different effective date is specified in the rule and the commission finds that action is necessary because of imminent peril to public health, safety or welfare, the specified date is the effective date.
 - (c) A temporary rule becomes effective upon filing with the Oregon Secretary of State and Washington Code Reviser, or at a designated later date, only if the statement required by 350-16-004(5) is filed with the rule. The commission shall take appropriate measures to make temporary rules known to the persons who may be affected by them.
- (3) When a rule is amended or repealed by the commission, the commission shall file a certified copy of the amendment or notice of repeal with the Oregon Secretary of State and Washington Code Reviser.
- (4) No rule of which a certified copy is required to be filed shall be valid or effective against any person or party until a certified copy is filed in accordance with this section. However, if the commission, in disposing of a contested case, announces in its decision the adoption of a general policy applicable to such case and subsequent cases of like nature the commission may rely upon such decision in disposition of later cases.

AMENDATORY SECTION

350-16-009. Notice, Hearing and Record in Contested Cases; Informal Dispositions; Hearings Officer; Statement of Ex Parte Communications.

(1) In a contested case hearing, all parties shall be afforded an opportunity for hearing after notice of not less than 20 days, served personally or by registered or certified mail.

(2) The notice shall include:

(a) A statement of the party's right to hearing, or a statement of the time and place of the hearing;

(b) A statement of the authority and jurisdiction under which the hearing is to be held;

(c) A reference to the particular sections of the statutes and rules involved;
and

(d) A short and plain statement of the matters asserted or charged;

(e) Unless otherwise ordered by the presiding officer, the names and mailing addresses of all parties to whom notice is being given and, if known, the names and addresses of their representatives;

(f) The official file or other reference number and the name of the proceeding;

(g) The name, official title, mailing address, and telephone number of the presiding officer, if known;

(h) A statement that a party who fails to attend or participate in a hearing or other stage of an adjudicative proceeding may be held in default in accordance with this chapter; and

(i) Any other matters considered desirable by the agency.

(3) Parties may elect to be represented by counsel and to respond and present evidence and argument on all issues involved.

(4) The commission may adopt rules of procedure governing participation in contested cases by person appearing as limited parties.

(5) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.

(6) An order adverse to a party may be issued upon default only upon prima facie case made on the record of the commission. When an order is effective only if a request for hearing is not made by the party, the record may be made at the time of issuance of the order, and if the order is based only on material included in the application or other submissions of the party, the commission may so certify and so notify the party, and such material shall constitute the evidentiary record of the proceeding if hearing is not requested. The commission shall serve a default order upon the defaulted party or the party's attorney, if any.

(7) Within seven days after service of a default order under subsection (6) of this section, the party against whom it was entered may file a written motion requesting that the order be vacated, and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of that party, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings. At the commencement of the hearing, the officer presiding shall explain the issues involved in the hearing and the matters that the parties must either prove or disprove.

(8) Testimony shall be taken upon oath or affirmation of the witness form when received. The officer presiding at the hearing shall administer oaths or affirmatives to witnesses.

~~(9) — A presiding officer who receives an ex parte communication during the pendency of a proceeding shall place on the record of the proceeding all written communications received, all written responses to the communications and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication. The presiding officer shall advise all parties that these matters have been placed on the record. Upon request made within ten days after notice of the ex parte communication, any party desiring to rebut the communication shall be allowed to place a written rebuttal statement on the record. repetitive, see 350-16-016 below~~

(940) The officer presiding at the hearing shall insure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the presiding officer in the case.

(1044) The record in a contested case shall include:

(a) All pleadings, motions and intermediate rulings.

(b) Evidence received or considered.

- (c) Stipulations.
- (d) A statement of matters officially noticed.
- (e) Questions and offers of proof, objections and rulings thereon.
- (f) A statement of any ex parte communications on a fact in issue made to the officer presiding at the hearing.
- (g) Proposed findings and exceptions.
- (h) Any proposed, intermediate or final order prepared by the commission or a hearings officer.

(~~11~~~~12~~) A verbatim oral, written or mechanical record shall be made of all motions, rulings and testimony. The record need not be transcribed unless requested for purposes of rehearing or court review. The commission may charge the party requesting transcription, unless the party files an appropriate affidavit of indigency.

AMENDATORY SECTION

350-16-014. Evidence in Contested Cases.

(1) Irrelevant, immaterial or unduly repetitious evidence shall be excluded but erroneous rulings on evidence shall not preclude commission action on the record unless shown to have substantially prejudiced the rights of a party. All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their ~~serous~~ serious affairs shall be admissible. The commission shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Any part of the evidence may be received in written form.

(2) All evidence shall be offered and made a part of the record in the case, and except for matters stipulated to an except as provided in subsection (4) of this section no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.

(3) Every party shall have the right of cross examination of witnesses who testify and shall have the right to submit rebuttal evidence. Persons appearing in a limited party status shall participate in the manner and to the extent prescribed by rule of the commission.

(4) The commission may take notice of judicially cognizable facts, and may take official notice of general, technical or scientific facts within its specialized

knowledge. Parties shall be notified at any time during the proceeding but in any event prior to the final decision of material officially noticed and the sources of the materials and they shall be afforded an opportunity to contest the facts so noticed. The commission may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

(5) No sanction shall be imposed or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party, and as supported by, and in accordance with, reliable, probative and substantial evidence.

(6) The commission may, at its discretion, be represented at the hearings by the Attorney General of Washington or Oregon.

AMENDATORY SECTION

350-16-016. Commission Statement of Ex Parte Communications; Notice.

(1) A presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding other than communications necessary to procedural aspects of maintaining an orderly process, with any person employed by the agency without notice and opportunity for all parties to participate, except as provided in this subsection:

- (a) Where the ultimate legal authority of an agency is vested in a multimember body, and where that body presides at an adjudication, members of the body may communicate with one another regarding the proceeding;
- (b) Any presiding officer may receive aid from legal counsel, or from staff assistants who are subject to the presiding officer's supervision; and
- (c) Presiding officers may communicate with other employees or consultants of the agency who have not participated in the proceeding in any manner, and who are not engaged in any investigative or prosecutorial functions in the same or a factually related case.
- (d) This subsection does not apply to communications required for the disposition of ex parte matters specifically authorized by statute.

(2) Unless required for the disposition of ex parte matters specifically authorized by statute or unless necessary to procedural aspects of maintaining an orderly process, a presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding, with any person not employed by the agency who has a direct or indirect interest in the outcome of the proceeding, without notice and opportunity for all parties to participate.

(3) Unless necessary to procedural aspects of maintaining an orderly process, persons to whom a presiding officer may not communicate under subsections (1) and (2) of this section may not communicate with presiding officers without notice and opportunity for all parties to participate.

(4) If, before serving as presiding officer in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (5) of this section.

(5) Portions of the record pertaining to ex parte communications or rebuttal statements do not constitute evidence of any fact at issue in the matter unless a party moves the admission of any portion of the record for purposes of establishing a fact at issue and that portion is admitted pursuant to 350-16-014.

(6) Any commissioner who receives an ex parte communication during the pendency of a proceeding shall place on the record of the proceeding all written communications received, all written responses to the communications and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the commissioner received an ex parte communication. The commissioner, or the Chair or presiding officer, shall advise all parties that these matters have been placed on the record. Upon request made within ten days after notice of the ex parte communication, any party desiring to rebut the communication shall be allowed to place a written rebuttal statement on the record.

(7) The Chair or presiding officer shall consider the position of the parties and, after review of the matter, make a recommendation to the Commission to ensure fairness and the appearance of fairness is maintained. The member of the Commission who was the subject of the ex parte contact may voluntarily step down from hearing the matter. The Commission may also request the member of the Commission to participate in the appeal or proceedings or the member of the Commission step down from hearing the matter, and the Chair or presiding officer may seal the portions of the record pertaining to the communication by protective order.

(8) The agency shall, and any party may, report any violation of this section to appropriate authorities for any disciplinary proceedings provided by law.

~~Any commissioner who receives an ex parte communication during the pendency of a proceeding shall place on the record of the proceeding all written communications received, all written responses to the communications and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the commissioner received an ex parte communication. The commissioner shall advise all parties that these matters have been placed on the record. Upon request made within ten days after notice of the ex parte communication, any party desiring to rebut the communication shall be allowed to place a written rebuttal statement on the record.~~

NEW SECTION

350-16-017. Appearance of Fairness

Members of the Commission shall comply with Washington's appearance of fairness doctrine in appeals and proceedings under this rule and under Rules 350-60 et seq. and Rules 350-70 et seq.

AMENDATORY SECTION

350-16-0187. Proposed Order by Hearings Officer; Amendment by Commission; Exemptions.

(1) Except as otherwise provided in subsections (1) to (3) of this section, unless a hearings officer is authorized or required by law or commission rule to issue a final order, the hearings officer shall prepare and serve on the commission and all parties to a contested case hearing a proposed order, including recommended findings of fact and conclusions of law. The proposed order shall become final after the 30th day following the date of service of the proposed order, unless the commission within that period issues an amended order.

(2) The commission may be rule specify a period of time after which a proposed order will become final that is different from that specified in subsection (1) of this section.

(3) If the commission determines that additional time will be necessary to allow the commission adequately to review a proposed order in a contested case, the commission may extend the time after which the proposed order will become final by a specified period of time. The commission shall notify the parties to the hearing of the period of extension.

AMENDATORY SECTION

350-16-0198. Orders in Contested Cases.

(1) Every order adverse to a party to the proceeding shall be in writing or stated in the record and may be accompanied by an opinion.

(2) A final order shall be accompanied by findings of fact and conclusions of law, and the reasons and basis therefore, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction. Any findings based substantially upon credibility of evidence or demeanor of witnesses shall be so identified.

The findings of fact shall consist of a concise statement of the underlying facts supporting the findings as to each contested issue of facts and as to each ultimate fact required to support the commission's order.

(3) The commission shall serve in writing any final order within 90 days after the hearing or after the submission of any additional memoranda, briefs or proposed findings. The commission shall notify the parties to a proceeding of a final order by delivering or mailing a copy of the order and any accompanying findings and conclusions to each party or, if applicable, the party's attorney of record.

(4) Every final order shall include a citation of the statutes under which the order may be appealed.